(9)

No. 02-1371

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT

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19 pp

QUESTION PRESENTED

Whether the Missouri Supreme Court correctly concluded that, under the totality of the circumstances, Patrice Seibert's pre-Miranda statement was involuntary where she was awoken in a hospital at 3:00 a.m., placed under arrest, taken to the police station, interrogated for 30-40 minutes without being advised of her Miranda rights, while police officers repeatedly squeezed her arm and suggested that the victim of a fire at her home was "supposed to die in his sleep"?

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OPINION BELOW

The opinion of the Missouri Supreme Court (Pet. App. 1-26) is reported at 93 S.W.3d 700 (Mo. banc 2002).

JURISDICTION

The judgment of the Missouri Supreme Court was entered on December 10, 2002. The petition for a writ of certiorari was filed on March 10, 2003. Petitioner invokes the jurisdiction of this court under 28 U.S.C. 1254(1); however, that provision relates to certiorari review of decisions by the federal courts of appeal. Jurisdiction is properly invoked under 28 U.S.C. 1257(a), authorizing this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution."

SUMMARY OF THE ARGUMENT

The Court should deny the petition for a writ of certiorari. Petitioner's argument rests on an incomplete and inaccurate account of the facts and the opinion below. When considered fully, the Missouri Supreme Court's decision represents nothing more than a straightforward application of the Due Process voluntariness test under an extreme set of facts unlikely to be repeated often. As it did at the government's recommendation in *United States v. Orso*, the Court should again deny certiorari over this fact-bound question that does not implicate a

clear legal disagreement between the federal courts of appeals or state supreme courts. Indeed, the decision below faithfully applies this Court's decision in *Westover v. United States*.

PETITIONER'S FACTUAL SUMMARY IS NOT SUFFICIENT TO RESOLVE THE QUESTION PRESENTED

Petitioner's question presented to the Court concerns the voluntariness of respondent's confession (Pet. App. i). A proper recitation of the factual history is critically important, as the resolution of a voluntariness inquiry is necessarily fact-bound. The unique nature of the facts in this case was recognized in the Missouri Supreme Court's opinion, wherein it used three distinct phrases to distinguish this case from other factual scenarios:

1) "And it may well be, *under circumstances that differ from those in this case*, that the prosecution may nevertheless be able to show that the confession was voluntary despite the Miranda-based presumption to the contrary." (Pet. App. 9) (emphasis added).

2) "*In light of the record in this case*, this Court presumes the violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." (Pet. App. 9) (emphasis added).

3) "*When presented with different circumstances, the result may be different*." [As an example, the Court discusses another Missouri case, *State v.*

Wright, 515 S.W.2d 421 (Mo. banc 1974), noting that Wright's subsequent statements were not coerced because "the second interrogation was held the following day, at a different location...and with different people present."] (Pet. App. A-11) (emphasis added).

In this particular case, where the fact-pattern is highly unusual, Petitioner's incomplete recitation of the facts must be corrected in order to ensure a proper review.[1] A more satisfactory factual summary is set forth in the Missouri Supreme Court's opinion (Pet. App. 1-26); however, respondent specifically draws the Court's attention to the following facts, relevant to the question presented, that were absent or misstated in petitioner's statement:

1. *Misstatement of fact*.

Petitioner states that respondent had a "role in arranging to burn down her mobile home, with a man inside, to cover up the death of her son [Jonathan] (who had apparently died of neglect for which respondent might have been blamed)." (Pet. 4). This is clearly a misstatement of the record below. The evidence, as presented through the State's medical examiner did not show that Jonathan died of neglect; in fact, the cause of death was never determined (Trial record 755-758).

[1] While this Court normally gives great deference to the factual findings of the state court, *see Davis v. North Carolina*, 384 U.S. 737, 741 (1966); *Haynes v. Washington*, 373 U.S. 503 (1963), "the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." *Miller v. Fenton* 474 U.S. 104, 112 (1985); *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991).

2. *Missing facts*

a) *The arrest:*

Petitioner simply states that "five days after the fire, respondent was arrested and taken to the police station, where she was placed in an interview room." (Pet. 4). This lone sentence disregards many of the facts surrounding respondent's arrest that were clearly important to the Missouri Supreme Court's holding. The facts, as more fully explicated by the court below, are as follows: On February 17, 1997, five days after the fire, respondent was asleep in a St. Louis hospital, where her oldest son was being treated for severe burns that he received in the fire (Pet. App. 2-3). Officer Clinton woke her at 3:00 a.m. and placed her under arrest (Pet. App. 3). Officer Hanrahan, who directed the arrest, specifically instructed Officer Clinton *not* to advise respondent of her *Miranda* rights. (Pet. App. 3). Once at the police station, respondent was left in a small interview room for 15-20 minutes to "give her a little time to think about the situation." (Pet. App. 3).

b) *The interrogation:*

Petitioner withheld from the petition the following facts about the interrogation: During the 30-40 minute unwarned interrogation, Officer Hanrahan squeezed respondent's arm and repeated the same statement, "Donald was also to die in his sleep," throughout much of the interview (Pet. App. 3)[2]. Respondent was questioned "in an intense manner" and she "became emotional during the

[2] "Donald" refers to a friend of respondent's oldest son who lived at respondent's home. (Pet. App. 2, Trial Record 754, 836, 854-855).

interview." (Pet. App. 10). Officer Hanrahan continued in this "intense manner" until respondent agreed that "Donald was to die in his sleep." (Pet. App. 10). When respondent finally made this admission, she was given a short break for a cup of coffee and a cigarette (Pet. App. 3). Thereafter, Officer Hanrahan began the second stage of the interrogation, advising respondent of her rights for the first time (Pet. App. 3). He began this second stage of his interrogation by referring to the first stage: "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" (Pet. App. 3). Then, with occasional reference to the first stage, pre-*Miranda* interrogation, Officer Hanrahan continued to question respondent until she repeated the statements she had made before receiving *Miranda* (Pet. App. 3). The reiterated confession closely followed the initial confession, and Officer Hanrahan obtained both in the same surroundings (Pet. App. 10).

By reviewing the factual discussion contained in the Missouri Supreme Court's opinion, as opposed to the petition, this Court will be better equipped to evaluate the propriety of granting or denying a writ in this case.

REASONS FOR DENYING THE WRIT

The practice of deliberately withholding the required warnings is not widespread, and the continued risk of such practice is minimal after Dickerson v. United States

Petitioner asserts that law enforcement officers nationwide are being trained to violate *Miranda* (Pet. 16-18). Petitioner has presented no concrete evidence to suggest that this type of training is widespread; indeed, an article in the FBI's Law Enforcement Bulletin from August 2001, Volume 70, No. 8, entitled *Miranda Revisited* (discussing the impact of *Dickerson*), warned that this type of training must be terminated immediately:

> "Departments must ensure that their officers do not interrogate 'outside Miranda,' and immediately abandon any condoned practice or policy of intentional violations of Miranda."

http://www.fbi.gov/publications/leb/2001/august2001/aug01p27.htm

In reality, very few *Miranda* cases decided in the nearly two decades since *Oregon v. Elstad*,[3] involve the deliberate refusal to give warnings once the custodial interrogation has commenced.[4] This is not surprising since this Court generally

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[3] *Oregon v. Elstad*, 470 U.S. 198 (1985).

[4] As noted by Justice O'Connor: "The published decisions of the lower federal courts show that ... [i]n case after case, the courts are asked on habeas to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. *Withrow v. Williams*, 507 U.S. 680, 709-710 (1993) (O'Connor, J., dissenting).

expects that law enforcement officers will follow its decisions -- especially those in which the Court's specific purpose was to delineate "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).[5]

Moreover, occasions such as this one, where the police deliberately refuse to Mirandize suspects, can be expected to decline after this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000). The custodial interrogation in this case took place in 1997; therefore, the interrogating officer's alleged training would not have included any explanation of this court's decision in *Dickerson*. This Court previously has recognized law enforcements' tendency to "grow in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda's* requirements." *Withrow v. Williams*, 507 U.S. 680, 695 (1993)[6]. Thus, after *Dickerson*, this Court can expect law enforcement to become even more vigilant about the timely administration of *Miranda* warnings. It is simply not a worthwhile endeavor for this Court to address a case that will affect so few defendants.

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[5] *See Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) ("we have no doubt that, in conducting most custodial interrogations...the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will.); and *Withrow v. Williams*, 507 U.S. 680, 714 (1993) (O'Connor, J., dissenting) ("We can depend on law enforcement officials to administer warnings in the first instance and the state courts to provide a remedy when law enforcement officers err.")

[6] The government's brief in *Dickerson* confirms that "federal law enforcement agencies have concluded that...the issuance of *Miranda* warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect."

The lower court opinions cited by petitioner merely reach different results under the highly fact-specific and fact-dependent voluntariness inquiry

Petitioner places the Eighth Circuit, the Missouri Supreme Court and (with hesitancy)[7] the D.C. Circuit on one side of the alleged conflict and the First and Ninth Circuits on the other. However, a review of the cases cited by petitioner reveals that the Courts have reached different outcomes, not because they are in conflict, but because they are factually distinct.

The starting point for analyzing the cases cited by petitioner is *United States v. Orso*, No. 01-9455, where this Court denied certiorari just six months ago. In its brief in opposition in *Orso*, the United States explained how the Ninth Circuit's decision in that case, the First Circuit's holding in *United States v. Esquilin* and the Eighth Circuit's holding in *United States v. Carter* could be easily reconciled. As the government pointed out, the Eighth Circuit's application of *Elstad* was not essential to the decision in *Carter* because it alternatively held that the defendant's post-*Miranda* confession was the fruit of an unconstitutional search. *Carter*, 884 F.2d 368, 374 (8th Cir. 1989). Indeed, *Carter* involved an exceptional set of facts not present in *Orso*: "there was no passage of time to speak of between the unwarned confession and the subsequent warning and confession, all of which

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[7] Petitioner states that the D.C. Circuit in *United States v. Gale*, 952 F.2d 1412 (D.C. Cir. 1992), "seems to have joined" the 8th Circuit on the side of the Missouri Supreme Court. However, *Gale* did not involve a deliberate refusal by the police officers to read a suspect his *Miranda* warnings, and the statement cited by petitioner is pure dicta. Moreover, it is not at all clear that the *Gale* court approved the holding of the 8th Circuit in *United States v. Carter*, 884 F.2d 368 (1989), since its facts were distinguishable.

occurred as part and parcel of a continuous process" and "the police had extracted an essentially complete confession at the time the *Miranda* warnings were given."

The Missouri Supreme Court simply applied this same reasoning to respondent's case. It found that the two stages of respondent's interrogation occurred in the same setting, with the same interrogator, who questioned her at length in an "intense manner," while purposefully withholding the *Miranda* warnings, until "she became emotional," and that the two stages amounted to "a nearly continuous period of interrogation," where the warned statement merely "confirmed her unwarned statements." (Pet. App. 9-12).

The Missouri Supreme Court did not carve out a *per se* exception to *Elstad* in cases where the police deliberately withhold *Miranda* rights, nor did it apply the "fruit of the poisonous tree" doctrine, as claimed by petitioner (Pet. 6). Rather, the Court simply applied the straight-forward voluntariness test found in *Elstad*. While the Court may have put a thumb on the scale, so to speak, in holding that the deliberate withholding of the *Miranda* rights created a presumption of coercion, it did not announce a *per se* rule (Pet. App. 9). Indeed, the Court made quite clear that "under circumstances that differ from those in this case, that the prosecution may nevertheless be able to show that the confession was voluntary despite the *Miranda*-based presumption to the contrary." (Pet. App. 9).

This is precisely the analysis in both the Ninth Circuit's *Orso* opinion, and the First Circuit's opinion in *United States v. Esquilin*, 208 F.3d 315 (1st Cir. 2000). The Ninth Circuit stated that "Orso's warned confession should therefore be

suppressed only if her statements in the car were involuntary, and any taint therefrom had not dissipated by that time." *Orso*, 266 F.3d at 1039. The First Circuit held that Esquilin's confession was not rendered involuntary solely by deliberately coercive or improper police tactics. *Esquilin*, 208 F.3d at 321. So, contrary to petitioner's claim, the legal landscape did not change after respondent's case was decided below. Instead, neither this case, nor *Orso*, nor *Esquilin*, has adopted a *per se* rule holding that the deliberate failure to Mirandize a defendant renders post-*Miranda* statements involuntary. Each case has applied the traditional due process voluntariness test to the second statement. While they have reached different results, that is not surprising since voluntariness findings depend so heavily on the facts and circumstances of each case.[8]

The Missouri Supreme Court took care to address the circumstances that rendered respondent's Mirandized confession involuntary. Officer Hanrahan's intentional refusal to advise respondent of her rights at the beginning of the interrogation process constituted but one such circumstance. Other indicia of involuntariness include the fact that she had been awoken at 3:00 a.m., taken from the hospital where she was sleeping by her burned child, and she was obviously emotionally distraught. In contrast, no such extreme indicia were present in *Orso* or *Esquilin*.

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[8] *Brown v. Illinois*, 422 U.S. 590 (1975) (The question whether a confession is voluntary must be answered on the facts of each case.)

The Missouri Court's decision was correct under existing Supreme Court precedent

In *Westover v. United States*, 384 U.S. 436, 496-97 (1966) (a companion case consolidated with *Miranda*), this Court suppressed a confession because a prolonged, un-Mirandized, custodial interrogation preceded a Mirandized interrogation that produced a confession. This Court found that the eventual reading of the *Miranda* warnings did not ease the pressure from the first unlawful interrogation. Subsequently, this Court has described "the cardinal fact of *Westover*" as being "the failure of the police officers to give any warnings whatever to the person in their custody before embarking on an intense and prolonged interrogation of him." *Michigan v. Mosley*, 423 U.S. 96, 107 (1975).

Westover still applies in situations where the initial statement is involuntary, and upon the facts of respondent's case, *Westover* would require reversal. The Missouri Supreme Court never found that respondent's first statement was voluntary, and when judged side-by-side with the facts in *Westover*, it was clearly involuntary. In fact, the "break-in-the-stream" analysis by the Missouri Supreme Court, was a *Westover* analysis, it simply did not cite *Westover*. Rather, it cited another Missouri case, *State v. Fakes*, 51 S.W.3d 24, 32-33 (Mo. App. 2001), for the proposition that "where the accused is subjected to a nearly continuous period of interrogation, it is unreasonable to assume...that the simple recitation of *Miranda* would resurrect the opportunity to obtain a voluntary waiver." (Pet. App. 10-11).

As the Missouri Supreme Court's decision was correct under *Westover v. United States, supra*, this Court's certiorari review is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. SWIFT
Assistant Public Defender
Counsel of Record

AMY M. BARTHOLOW
Assistant Public Defender
Of Counsel

APRIL 18, 2003

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DECLARATION OF SERVICE

I, Amy M. Bartholow, hereby declare that on this 18th day of April, 2003, a copy of the Brief in Opposition for Respondent with attached *in forma pauperis* motion in the above case was served by mail, first-class, postage prepaid, on: James R. Layton, State Solicitor, P.O. Box 899, Jefferson City, MO 65102. Phone: (573) 751-3321, *Counsel of Record for Petitioner*. All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Amy M. Bartholow
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Of Counsel for Respondent

Executed before me this April 18, 2003.

JANET DIEMLER
MY COMMISSION EXPIRES
September 25, 2003
NOTARY SEAL
Callaway County
NOTARY PUBLIC STATE OF MISSOURI

Janet S. Diemler
Notary Public

My commission expires: September 25, 2003.

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April 18, 2003

William K. Suter, Clerk
Supreme Court of the United States
One First Street NE
Washington, D.C. 20543

RE: *State of Missouri v. Patrice Seibert*, No. 02-1371

Dear Mr. Suter:

Enclosed for filing are: 1) the original and ten (10) copies of the Brief in Opposition for Respondent; 2) the original and ten (10) copies of the motion to proceed *in forma pauperis* with respondent's notarized affidavit attached; and 3) a notarized declaration of service reflecting service on Petitioner's counsel.

Thank you for your attention in this matter. Please contact me if the enclosed documents prompt any questions.

Sincerely,

Amy M. Bartholow
AMY M. BARTHOLOW
Assistant Public Defender
Of Counsel for Petitioner

Enc.

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